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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

CTIA - THE WIRELESS ASSOCIATION,)	
)	
PLAINTIFF,)	
)	
VS.)	NO. C 10-3224 WHA
)	
THE CITY AND COUNTY OF SAN)	
FRANCISCO,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	THURSDAY
)	OCTOBER 20, 2011
)	

TRANSCRIPT OF PROCEEDINGS

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FOR PLAINTIFF

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PROCEEDINGS; THURSDAY, OCTOBER 20, 2011

THE COURT: LET'S GO NOW TO CTIA VERSUS CITY AND COUNTY OF SAN FRANCISCO.

MR. MITTELSTAEDT: GOOD MORNING, YOUR HONOR. BOB MITTELSTAEDT, JONES DAY, FOR CTIA. WITH ME ARE ANDREW MCBRIDE AND SEAMUS DUFFY AND JANE THORPE. MR. MCBRIDE WILL ADDRESS THE FIRST AMENDMENT ISSUES, IF IT PLEASE THE COURT.

THE COURT: TIME IS GOING TO BE SHORT.

MR. MITTELSTAEDT: AND MR. DUFFY ON THE PREEMPTION.

THE COURT: EACH SIDE HAS ABOUT 20 MINUTES TOTAL. LET'S HEAR FROM THE CITY AND COUNTY OF SAN FRANCISCO.

MR. CHHABRIA: GOOD MORNING, YOUR HONOR. VINCE CHHABRIA FROM THE CITY AND COUNTY OF SAN FRANCISCO. WITH ME TODAY IS SUSHMA ATHIA FROM THE SAN FRANCISCO DEPARTMENT OF THE ENVIRONMENT.

THE COURT: THANK YOU. WELCOME. LET'S HEAR FROM THE MOVING PARTY.

MR. MCBRIDE: GOOD MORNING, YOUR HONOR. ANDREW MCBRIDE FOR CTIA. I WILL BE BRIEF. I KNOW THE COURT IS PRESSED FOR TIME.

THREE LEGAL POINTS, ONE PRACTICAL POINT.

LEGAL POINT IS, TRY AS IT MIGHT, THE CITY SIMPLY CAN'T SHOEHORN THESE MATERIALS INTO THE NARROW ZAUDERER EXCEPTION FOR THINGS LIKE CALORIE COUNT OR MERCURY. HERE WE

1 HAVE THREE STRAIGHT PIECES OF MATERIAL THAT EXPRESS VIEWS ABOUT
2 HOW THE FCC HAS DONE ITS JOB WHETHER OR NOT CELLPHONES ARE
3 SAFE, AND ALSO HOW YOU SHOULD USE CELLPHONES, WHO SHOULD USE
4 CELLPHONES, WHERE CELLPHONES SHOULD BE USED. THAT IS NOT THE
5 PURELY FACTUAL INFORMATION THAT IS ALLOWED UNDER ZAUDERER AND
6 UNDER SCHWARZENEGGER, UNDER THE NINTH CIRCUIT CASE IN
7 SCHWARZENEGGER, THAT WAS AFFIRMED BY THE SUPREME COURT.

8 THE SECOND POINT IS THAT EVEN IF ZAUDERER APPLIED,
9 THEY COULDN'T PASS THE TEST BECAUSE IT HAS TO BE TRUE, AND SOME
10 OF THE SPEECH HERE IS NOT TRUE, IS MISLEADING, AND THE COURT
11 HAS IN THE RECORD --

12 **THE COURT:** WHICH PART IS NOT TRUE?

13 **MR. MCBRIDE:** IT IS NOT TRUE THAT TISSUE OF CHILDREN
14 ABSORBS RF ENERGY IN ANY WAY DIFFERENT FROM THE TISSUE OF
15 ADULTS.

16 I WOULD SAY SORT OF THE BIG PICTURE HERE IS THAT THE
17 FCC HAS SET A STANDARD THAT HAS 50-FOLD SAFETY FACTOR IN IT SO
18 THAT ALL PHONES ARE SAFE. AND SO THE IDEA THAT YOU BECOME
19 SAFER IF YOU HOLD THE PHONE AWAY FROM YOU OR TURN THE PHONE OFF
20 IS FALSE. AND, YOUR HONOR, THE SCIENCE THERE -- AND IT'S IN
21 THE PETERSEN DECLARATION, WHICH IS UNREBUTTED.

22 THE SCIENCE THERE IS -- THE ANALOGY I USE IS A LIGHT
23 BULB. AN 80-WATT LIGHT BULB WON'T HURT YOUR EYES. IT WILL NOT
24 BURN YOUR RETINA. ARE YOU ANY SAFER WITH A 60-WATT LIGHT BULB?
25 NO, YOU'RE NOT ANY SAFER. IT'S A THRESHOLD PHENOMENON. AT

1 SOME VERY HIGH POINT LIGHT WILL HURT YOUR EYES. BUT THE
2 DIFFERENCE BETWEEN 80 AND 60 IS NOT RELEVANT FROM A SCIENTIFIC
3 POINT OF VIEW. THAT STANDS UNREBUTTED IN THE RECORD. THAT'S
4 SORT OF THE WHOLE MESSAGE.

5 THE THIRD POINT I WOULD MAKE IS -- I WOULD ASK IF ANY
6 COLLEAGUE CAN APPROACH THE BENCH AND HAND UP THE ACTUAL
7 MATERIALS THEMSELVES?

8 **THE COURT:** SURE.

9 **MR. MCBRIDE:** THE THIRD POINT I WOULD MAKE HERE IS,
10 IF THIS IS NOT A WARNING, I DON'T KNOW WHAT IS. AND, IN
11 PARTICULAR, I'M TALKING ABOUT THE POSTER THAT IS BEING HANDED
12 UP TO THE COURT NOW, AND THE INFORMATION SHEET, AND ALSO THE
13 STICKER. AND WE HAVE INCLUDED FOR YOUR HONOR AN EXEMPLAR WHICH
14 I THINK HAS BEEN EVEN GIVEN TO MR. CHHABRIA OF WHAT'S CALLED A
15 CALL-OUT CARD IN A VERIZON STORE.

16 OUR POINT ON THAT -- THE COURT HAS THAT IN ITS HAND
17 NOW. OUR POINT ON THAT IS EXACTLY WHAT THE COURT IS DOING NOW.
18 YOU KNOW, YOU CAN'T PASS ZAUDERER IF SOME OF OUR SPEECH IS
19 KNOCKED OUT. AND CLEARLY HERE, WITH THESE CALL-OUT CARDS,
20 WHICH THE D'AMBROSIA DECLARATION --

21 **THE COURT:** STICKERS, YOU ARE TALKING ABOUT THE
22 STICKERS?

23 **MR. MCBRIDE:** YEAH, I AM TALKING ABOUT THE STICKER,
24 WHICH DOESN'T HAVE ANY AFFIRMATION IT IS THE STATEMENT OF THE
25 CITY.

1 I WOULD ASK THE COURT TO THINK ABOUT THAT STICKER 30
2 TIMES IN A STORE WITH 30 DIFFERENT PHONES ON EACH CALL-OUT
3 CARD. AND, YOU KNOW, AS I TRY TO COVER IT UP, THE THING THAT
4 WENT WAS, THIS PHONE IS HEARING AID COMPATIBLE.

5 SO SOME INFORMATION IS GOING TO HAVE TO BE EXCLUDED
6 FOR THE SAN FRANCISCO INFORMATION. NONE OF THE ZAUDERER CASES
7 DO.

8 PUTTING THE CALORIE COUNT ON A MENU OR SAYING THE
9 LIGHT BULB CONTAINS MERCURY, A SIMPLE, TRUE STATEMENT OF FACT,
10 IS SO FAR AWAY FROM THIS THAT, YOU KNOW, WITH ALL DUE
11 RESPECT -- AND THESE GOOD CITY LAWYERS, THEY SIMPLY CAN'T
12 SHOEHORN THIS HUGE DISCLOSURE OF CONTROVERSIAL OPINIONS THAT
13 THE CITY HOLDS INTO CASES THAT SAY YOU CAN PUT A CALORIE COUNT
14 NEXT TO A HAMBURGER.

15 THIS IS LIKE -- IF THE CITY OF NEW YORK IN THE
16 RESTAURANT CASE HAD SAID, NOT JUST THE CALORIE COUNT, YOU HAVE
17 TO PUT NEXT TO THE HAMBURGER, EATING AT FAST FOOD RESTAURANTS
18 IS NOT CONSISTENT WITH A HEALTHY LIFESTYLE.

19 THAT'S THE KIND OF OPINION THAT THE CITY WANTS TO PUT
20 IN OUR STORES, AND THAT IS REALLY -- IF THE CITY CAN DO THAT
21 WITHOUT ANY FIRST AMENDMENT SCRUTINY OR UNDER ZAUDERER, WITHOUT
22 CORRECTING ANYTHING WE SAID, THE FIRST AMENDMENT IS REALLY A
23 DEAD LETTER. THE CITY CAN SPEAK THROUGH ANYONE IN ANY WAY IT
24 WANTS.

25 THE CITY COULD SAY: WE WANT EVERY STORE IN THE CITY

1 TO ANNOUNCE THAT THE CITY'S POSITION IS THAT ETHICAL SOURCING
2 IS A GOOD THING, OR, THAT EVERY BUILDING IN THE CITY SHOULD BE
3 GREEN. THAT IS THE CITY TAKING OVER THE DEBATE.

4 THAT IS THE PG&E CASE, WHERE JUSTICE POWELL SAID,
5 LOOK, IT DOESN'T MATTER THAT THE SPEECH IS ATTRIBUTED TO THE
6 THIRD PARTY, WHAT MATTERS IS THE CITY IS SETTING THE AGENDA;
7 THE CITY IS SAYING, WELL, WE THINK THAT THESE RETAIL STORES
8 SHOULD BE A PLACE WHERE THESE ISSUES ARE DEBATED.

9 THAT'S NOT RIGHT. A GOVERNMENTAL ENTITY CAN'T GIVE
10 ITS SIDE OF THE DEBATE IN PUBLIC AND FORCE IT THROUGH A THIRD
11 PARTY. WHAT IT CAN DO, OBVIOUSLY, IS SPEAK ON ITS OWN WEBSITE,
12 SPEAK IN ITS OWN BUILDINGS. WHAT IT CAN'T DO IS MAKE THIRD
13 PARTIES, PRIVATE PARTIES, SPEAK.

14 THE THIRD THING I WOULD POINT OUT IS THIS IS A
15 WARNING. IF THIS ISN'T A WARNING, NOTHING IS A WARNING.

16 THE COURT HAS BEFORE IT THE STEWART DECLARATION.
17 DEAN STEWART TOOK A SURVEY OF THE PRIOR MATERIALS. THESE
18 MATERIALS ARE WORSE. THE CONCENTRIC CIRCLES OF RED AROUND THE
19 HEAD AND PELVIC AREA, I DON'T NEED TO EXPLAIN. IT'S LIKE
20 PLAYING A POLICE SIREN AND SAYING, ARE YOU CONCERNED. RIGHT
21 BELOW IT, IT SAYS, IF YOU'RE CONCERNED, THE CITY RECOMMENDS...
22 AND, OBVIOUSLY, RECOMMENDATIONS ARE NOT FACTS. THEY ARE
23 OPINIONS.

24 BUT CLEARLY -- AND THE CITY -- I WOULD POINT THE
25 COURT TO PAGE 11 OF THE CITY'S OPPOSITION BRIEF. THERE IT

1 ADMITS THAT IF THESE MATERIALS CONVEY THE CONCLUSION THAT FCC
2 PHONES ARE UNSAFE, WE'RE RIGHT, THAT THE FIRST AMENDMENT IS
3 VIOLATED AND IT'S PREEMPTED. WE'RE RIGHT BECAUSE YOU JUST
4 CAN'T DO THAT.

5 AND I WOULD SUBMIT THAT, YOU KNOW, COMMON SENSE,
6 JUDICIAL COMMON SENSE, TELLS YOU THAT'S WHAT THE MESSAGE THESE
7 MATERIALS SEND. HOW MANY MOTHERS ARE GOING TO WALK INTO A
8 RETAIL STORE AND SAY, YOU KNOW, I MIGHT NOT BUY A PHONE FOR MY
9 13 YEAR OLD BECAUSE THE CITY HAS GIVEN ME THIS WARNING ABOUT
10 CHILDREN?

11 THE OTHER POINT I WOULD MAKE IS -- AND THIS IS A
12 PRACTICAL POINT -- IS THAT THERE'S AFFIRMATIVE HARM TO THE
13 CITY'S RECOMMENDATIONS, AND WHAT WE'RE ASKING IS THAT THE
14 COURT -- THIS IS THE OFFICE OF RULE 65, REALLY, THE CLASSIC
15 OFFICE OF RULE 65, MAINTAIN STATUS QUO.

16 NOW, THE CITY STARTED THIS PROCESS IN JUNE OF 2010.
17 AND A LITTLE HISTORY IS IMPORTANT HERE. I KNOW THE COURT
18 DOESN'T HAVE A LOT OF TIME. BUT, YOU KNOW, THE CITY HAD A
19 DIFFERENT REGIME. WE CAME FORWARD WITH EXPERTS THAT SAID,
20 YOU'RE WRONG, THIS IS HIGHLY MISLEADING. THE CITY THEN
21 ABANDONED THAT REGIME.

22 MY POINT IS -- TWO POINTS. ONE, THE CITY GOT IT
23 WRONG BEFORE, AND THE COURT SHOULDN'T LET THESE MATERIALS OUT
24 INTO THE PUBLIC REALM BECAUSE WE THINK THE CITY'S GOTTEN IT
25 WRONG AGAIN. ONCE THAT BELL IS RUNG, IT CAN'T BE UNRUNG.

1 THAT'S IRREPARABLE INJURY. THAT'S AT THE HEART OF IRREPARABLE
2 INJURY, ALONG WITH THE INJURY THAT WE HAVE AS A MATTER OF LAW
3 UNDER THE FIRST AMENDMENT.

4 THE SECOND POINT IS I WOULD ASK THE COURT
5 RESPECTFULLY TO ASK MR. CHHABRIA, WHAT'S THE RUSH? JULY 10TH,
6 2010, IS WHEN THEY ENACTED THE FIRST ORDINANCE. THEY FOUND OUT
7 THEY WERE IN ERROR. THEY'RE CANDID ABOUT THAT IN THEIR PAPERS.
8 THEY CORRECT IT. BUT THAT'S 15 MONTHS SINCE THEY STARTED THIS
9 PROCESS. THE WORLD HASN'T ENDED. ON THE OTHER HAND, WE
10 CLEARLY HAVE IRREPARABLE INJURY UNDER THE FIRST AMENDMENT. SO
11 THE CITY -- WHY WOULD THE CITY SAY, WE HAVE TO GET THIS INTO
12 EFFECT RIGHT AWAY?

13 THE FIRST ORDINANCE ACTUALLY HAS A SIX-MONTH RAMP-UP
14 PERIOD, WHICH ALLOWED US TO LITIGATE IT IN A SUMMARY JUDGMENT
15 FASHION BEFORE YOUR HONOR. I THINK EVERYONE RECOGNIZES THIS IS
16 A SUMMARY JUDGMENT CASE. THIS TIME THE COMPLIANCE PERIOD IS 15
17 DAYS. AGAIN, I'D ASK THE CITY, WHY 15 DAYS?

18 I THINK, YOUR HONOR, THAT THE -- GIVEN THE SERIOUS
19 LEGAL QUESTIONS HERE UNDER THE FIRST AMENDMENT, AND THEY ARE
20 VERY, VERY SERIOUS, THAT THE COURT SHOULD MAINTAIN THE STATUS
21 QUO; THAT ONCE THESE MATERIALS ARE OUT IN PUBLIC, WE FEEL THAT
22 THEY'RE ALARMIST MATERIALS, THEY HAVE FALSE STATEMENTS IN THEM,
23 AND THEY WILL, IN FACT, INJURE OUR BUSINESS.

24 AND I THINK THE COURT CAN SEE THE MULTIPLICITY OF
25 MATERIALS -- I GUESS THAT WOULD BE MY FINAL POINT ON THE FIRST

1 AMENDMENT, THAT NONE OF THE ZAUDERER CASES AUTHORIZE THIS KIND
2 OF PLETHORA OF MATERIAL TO BE FORCED ONTO A PRIVATE PARTY.

3 WE HAVE THREE DIFFERENT CHANNELS OF SPEECH HERE. THE
4 POSTER HAS TO BE PLACED IN A PROMINENT PLACE IN OUR STORE. SO
5 PART OF OUR WALLS ARE TAKEN UP WITH A MESSAGE THAT WE DISAGREE
6 WITH AND THAT OUR PRODUCT IS SOMEHOW DEFECTIVE.

7 SECONDLY, WE HAVE TO HAND OUT THE FACT SHEET TO
8 EVERYONE WHO BUYS A PHONE, TO EVERYONE WHO BUYS A PHONE, AND IN
9 VERIZON'S CASE --

10 **THE COURT:** OR ANYONE WHO REQUESTS IT.

11 **MR. MCBRIDE:** OR ANYONE WHO REQUESTS IT.

12 BUT IN VERIZON'S CASE, WITH THEIR PAPERLESS
13 INITIATIVE, THAT WILL BE THE ONLY PIECE OF PAPER YOU GET WITH
14 THE PHONE.

15 SO, AND THEN THE THIRD --

16 **THE COURT:** I DON'T UNDERSTAND THAT PART. IF
17 SOMEBODY BUYS A VERIZON PHONE, THEY DON'T GET A MANUAL?

18 **MR. MCBRIDE:** THE MANUAL IS AVAILABLE ONLINE, AND
19 THEY GET A RECEIPT BY E-MAIL. THAT'S THE WAY TO DO IT WITHOUT
20 ANY PAPER, YOUR HONOR.

21 **THE COURT:** ALL RIGHT.

22 **MR. MCBRIDE:** I GUESS THE THIRD CHANNEL IS THE
23 STICKER. SO I ASKED THE COURT EARLIER TO IMAGINE 30 OR 40
24 PHONES IN THE STORE WITH THAT STICKER ON EACH ONE OF THOSE
25 CALL-OUT CARDS THAT THE COURT HAS BEFORE IT -- I MEAN, THE CITY

1 HAS TAKEN OVER THE STORE TO DELIVER ITS MESSAGE.

2 **THE COURT:** THIS IS THE -- (INDICATING).

3 **MR. MCBRIDE:** YES.

4 **THE COURT:** YOU'VE GOT TO STICK IT ON THERE
5 SOMEWHERE, BUT THERE'S NOT ENOUGH ROOM.

6 **MR. MCBRIDE:** THAT'S MY POINT, YOUR HONOR. ZAUDERER
7 DOESN'T ALLOW THE CITY TO ESSENTIALLY REPLACE OUR SPEECH WITH
8 ITS SPEECH. SO EVEN UNDER THE ZAUDERER TEST, THE CITY FAILS.

9 SO WE WOULD ASK THE COURT TO ENTER A PRELIMINARY
10 INJUNCTION, MAINTAIN STATUS QUO, AND ALLOW THIS CASE TO BE
11 LITIGATED TO SUMMARY JUDGMENT. AND WE THINK UNDER THE NINTH
12 CIRCUIT STANDARD, CLEARLY -- FIRST OF ALL, WE THINK WE HAVE A
13 HIGH LIKELIHOOD OF SUCCESS ON THE FIRST AMENDMENT.

14 SECONDLY, IRREPARABLE INJURY, WE HAVE IT AS A MATTER
15 OF LAW. THERE'S NO DOUBT THAT WE'RE MAKING LAWFUL AT LEAST
16 COMMERCIAL SPEECH IN OUR STORES AND IT'S IMPACTED BY THIS
17 ORDINANCE.

18 SECONDLY, THERE'S CERTAINLY A SERIOUS QUESTION, A
19 SERIOUS CONSTITUTIONAL QUESTION THAT THE COURT IS GOING TO HAVE
20 TO GRAPPLE WITH HERE, AND THE BALANCE OF THE EQUITIES IS
21 SOLIDLY ON OUR SIDE. I CAN'T THINK OF ANY HARM TO THE CITY OR
22 THE PUBLIC FROM WAITING AND GIVING THE COURT AN OPPORTUNITY TO
23 LITIGATE THESE ISSUES.

24 I THINK THERE'S GOING TO BE SOME EXPERT DISCOVERY AND
25 THEN SUMMARY JUDGMENT MOTIONS BEFORE THE COURT. WE WOULD ASK

1 THE COURT TO ENTER A PRELIMINARY INJUNCTION UNTIL IT REACHES
2 FINAL JUDGMENT IN THIS MATTER.

3 THANK YOU.

4 **MR. CHHABRIA:** YOUR HONOR, MAY I ADDRESS THE FIRST
5 AMENDMENT ISSUES BEFORE WE TURN TO PREEMPTION?

6 **THE COURT:** OKAY. GO AHEAD.

7 **MR. CHHABRIA:** THANK YOU.

8 I'D LIKE TO START WITH MR. MCBRIDE'S COMMENT ABOUT
9 TAKING OVER THE DEBATE, BECAUSE I THINK THAT'S CENTRAL TO THEIR
10 PAPERS, AND IT'S CENTRAL TO THEIR FIRST AMENDMENT ARGUMENT.

11 THEY ARGUE THE CITY, BY REQUIRING THE CELLPHONE
12 STORES TO PROVIDE THESE MATERIALS, IS TAKING OVER THE DEBATE.
13 AND THE ANALOGY, OF COURSE, IS TO CASES INVOLVING GOVERNMENTAL
14 INTRUSION UPON PARADES, NEWSPAPERS, NEWSLETTERS, CHARITABLE
15 SOLICITATIONS. AND I KNOW ON THE COMMON-SENSE LEVEL IT'S CLEAR
16 THAT A RETAIL STORE IS NOT LIKE A PARADE OR A NEWSLETTER, BUT I
17 WANT TO TALK FOR A MINUTE DOCTRINALLY ABOUT WHY THEIR RELIANCE
18 ON THOSE CASES IS MISPLACED.

19 IN EACH OF THOSE INSTANCES, THE GOVERNMENT REGULATION
20 WAS IMPOSED UPON SPEECH. A PARADE, OF COURSE, IS A MODE OF
21 EXPRESSION. THE GOVERNMENT REGULATION IN HURLEY WAS IMPOSED
22 UPON THE PARADE, IMPOSED UPON SPEECH. OF COURSE, YOU ARE GOING
23 TO ALTER THE CONTENT OF THE SPEECH WHEN YOU IMPOSE SPEECH UPON
24 SPEECH. SAME IS TRUE OF A NEWSPAPER, A NEWSLETTER, A
25 CHARITABLE SOLICITATION.

1 HERE WE ARE NOT IMPOSING ANY REQUIREMENT UPON SPEECH.
2 WE ARE IMPOSING A REQUIREMENT UPON THE SALE OF A CELLPHONE.
3 OUR REGULATION IS NOT TRIGGERED BY ANY SPEECH. IT IS TRIGGERED
4 BY THE SALE OF A PRODUCT.

5 **THE COURT:** WELL, THAT'S NOT QUITE RIGHT. YOUR
6 REGULATION REQUIRES THAT THIS STICKER BE PASTED ON THE DISPLAY
7 ADVERTISEMENTS IN THE STORE.

8 **MR. CHHABRIA:** WELL, THAT'S TRUE. SO THERE IS A
9 SLIGHT DISTINCTION --

10 **THE COURT:** IT DOESN'T EVEN SAY THAT THIS COMES FROM
11 THE CITY AND COUNTY OF SAN FRANCISCO. FOR ALL THE CUSTOMER IS
12 GOING TO KNOW, SAMSUNG IS TELLING YOU YOUR HEAD AND BODY ABSORB
13 RF ENERGY FROM CELLPHONES; IF YOU WISH TO REDUCE YOUR EXPOSURE,
14 ASK FOR SAN FRANCISCO'S FREE FACT SHEET.

15 I MEAN, THIS LOOKS LIKE IT COMES FROM SAMSUNG. HOW
16 CAN YOU POSSIBLY SAY YOU'RE NOT IMPOSING SPEECH ON SPEECH?

17 **MR. CHHABRIA:** WELL, I DISAGREE WITH A COUPLE OF
18 PREMISES OF YOUR HONOR'S QUESTIONS.

19 **THE COURT:** LET'S HEAR THAT.

20 **MR. CHHABRIA:** FIRST AND VERY IMPORTANTLY, THAT IS A
21 SLIGHT DISTINCTION BETWEEN THE STICKER, ON THE ONE HAND, AND
22 THE POSTER AND THE FACT SHEET ON THE OTHER. SO BOOKMARK THAT.

23 NUMBER TWO --

24 **THE COURT:** A SLIGHT DISTINCTION?

25 **MR. CHHABRIA:** WELL, HERE'S WHY I THINK IT'S SLIGHT.

1 **THE COURT:** LET'S LOOK AT WHAT YOU SAY IS SLIGHT.

2 AT LEAST THE POSTER, WHICH IS 11-BY-17, HAS THE CITY
3 AND COUNTY SEAL AT THE TOP IN TWO PLACES. THEN IT'S GOT DOWN
4 AT THE BOTTOM, "THIS MATERIAL WAS PREPARED BY THE CITY AND
5 COUNTY OF SAN FRANCISCO AND MUST BE PROVIDED TO CONSUMERS UNDER
6 LOCAL LAW." SO IF SOMEBODY AT LEAST READS THIS CAREFULLY
7 ENOUGH, THEY'LL REALIZE THIS IS THE CITY AND COUNTY OF SAN
8 FRANCISCO TALKING AND NOT SAMSUNG TALKING. BUT IF THEY SEE THE
9 STICKER, THEY'RE NOT GOING TO APPRECIATE THAT DISTINCTION. YOU
10 SAY IT'S A SUBTLE DISTINCTION. I DON'T THINK I AGREE WITH
11 THAT.

12 **MR. CHHABRIA:** HERE'S WHY I THINK IT'S A SLIGHT
13 DISTINCTION, COUPLE OF REASONS. NUMBER ONE, IT DOES SAY, ASK
14 FOR SAN FRANCISCO'S FACT SHEET, AND THERE IS A POSTER IN THE
15 STORE WHICH MAKES REFERENCE TO SAN FRANCISCO'S MATERIALS.
16 THAT'S NUMBER ONE.

17 NUMBER TWO, I JUST WANT TO MAKE CLEAR THAT BECAUSE --
18 MERELY BECAUSE THE STICKER IS REQUIRED TO BE POSTED WITH
19 DISPLAY MATERIALS DOESN'T MEAN IT IS INTERFERING WITH SPEECH
20 INTRUDING UPON SPEECH. THIS IS STILL A COMMERCIAL TRANSACTION,
21 AND THIS IS STILL AN OFFER TO PURCHASE A CELLPHONE.

22 THERE'S NO RULE THAT SAYS THAT THESE CALL-OUT CARDS
23 HAVE TO BE A CERTAIN SIZE. THERE'S NO RULE THAT SAYS THEY
24 CAN'T INCREASE THE SIZE OF THEIR CALL-OUT CARD TO ACCOMMODATE
25 THE CITY'S STICKER.

1 ALL OF THAT SAID, YOU KNOW, I CONCEDE TO YOUR HONOR
2 THERE IS A DISTINCTION IN THAT REGARD, AND SOMEONE DOES NOT
3 HAVE TO LOOK EVEN CAREFULLY AT THE CITY'S POSTER OR THE CITY'S
4 FACT SHEET TO KNOW IT'S BROUGHT TO YOU BY THE CITY AND COUNTY
5 OF SAN FRANCISCO. THOSE MATERIALS SCREAM THAT OUT, AND I DO
6 CONCEDE TO YOUR HONOR THAT THE STICKER IS A LITTLE MORE SUBTLE
7 IN THAT REGARD.

8 BUT MY MAIN POINT IS THAT A RETAIL STORE IS NOT,
9 EITHER FROM A DOCTRINAL PERSPECTIVE OR A COMMON SENSE
10 PERSPECTIVE A NEWSLETTER, AND THIS IS NOT A SITUATION IN WHICH
11 THE CITY IS REQUIRING SOMEBODY TO ALTER TO THEIR EDITORIAL
12 COMMENT. IT IS A DISCLOSURE REQUIREMENT IN WHICH THE
13 GOVERNMENT IS REQUIRING A COMPANY TO PROVIDE INFORMATION ABOUT
14 A PRODUCT IN CONNECTION WITH THE SALE OF THAT PRODUCT.

15 **THE COURT:** BUT DO YOU AGREE THAT UNDER THE -- THAT
16 THE LAW WOULD REQUIRE -- FIRST AMENDMENT LAW WOULD -- FOR YOU
17 TO IMPOSE THIS, THE INFORMATION HAS TO BE ACCURATE; IT HAS TO
18 BE FACTUAL AND ACCURATE?

19 **MR. CHHABRIA:** IT IS FACTUAL AND ACCURATE.

20 **THE COURT:** ALL RIGHT. SO YOU SAY, IF YOU'RE
21 CONCERNED ABOUT POTENTIAL HEALTH EFFECTS FROM CELLPHONE RF
22 ENERGY, THE CITY AND COUNTY OF SAN FRANCISCO RECOMMENDS... AND
23 ONE OF THEM IS USING BELT CLIPS AND PURSES TO KEEP DISTANCE
24 BETWEEN YOUR PHONE AND BODY. NOW, THE BELT CLIP THEY GAVE ME
25 WITH MY PHONE, IT MUST BE 1/8TH OF AN INCH.

1 **MR. CHHABRIA:** WELL, IF YOU GO TO THE --

2 **THE COURT:** YOU ARE SAYING 1/8TH OF AN INCH MAKES A
3 DIFFERENCE BETWEEN CARRYING IT ON YOUR BODY -- IT SAYS, DO NOT
4 CARRY ON YOUR BODY TO AT LEAST MEET THE DISTANCE SPECIFIED IN
5 YOUR PHONE USER'S MANUAL?

6 **MR. CHHABRIA:** IT MAKES A BIG DIFFERENCE. AND THE
7 PHONE USERS' MANUALS MAKE CLEAR IT MAKES A BIG DIFFERENCE. AS
8 A MATTER OF FACT, MOTOROLA'S USER MANUAL, WHICH IS ATTACHED AS
9 EXHIBIT F TO OUR REQUEST FOR JUDICIAL NOTICE -- EXCUSE ME -- TO
10 THE DECLARATION OF CAITLIN SANDERS, STATES THERE MAY BE SERIOUS
11 HEALTH PROBLEMS IF YOU DO NOT USE A MOTOROLA-APPROVED BELT CLIP
12 AND IF YOU DO NOT KEEP YOUR PHONE THAT FAR AWAY FROM YOUR BODY.
13 SO, ABSOLUTELY --

14 **THE COURT:** THAT FAR AWAY IS 1/8TH OF AN INCH?

15 **MR. CHHABRIA:** IT'S A BIG DEAL.

16 **THE COURT:** THAT'S A BIG DEAL?

17 **MR. CHHABRIA:** IT'S A BIG DEAL. AND MOST OF THE USER
18 MANUALS SPECIFY --

19 **THE COURT:** WHERE DOES THAT SCIENCE COME FROM?

20 **MR. CHHABRIA:** THAT SCIENCE, EVEN THE
21 MANUFACTURERS --

22 **THE COURT:** JUST GIVE ME THE REAL SCIENCE, NOT WHAT
23 THE PROPAGANDA IS.

24 I DO KNOW SOMETHING ABOUT RADIO FREQUENCY ENERGY. I
25 KNOW SOMETHING ABOUT THIS SCIENCE. AND I UNDERSTAND THAT THE

1 CLOSER YOU ARE TO THE SOURCE, THE MORE INTENSE IT IS. IT'S BY
2 THE LAW OF SQUARES. I UNDERSTAND THAT. BUT 1/8TH OF AN INCH
3 IS PRETTY CLOSE. AND YOU'RE SUGGESTING THAT 1/8TH OF AN INCH
4 IS OKAY AS LONG AS YOU ARE USING A BELT CLIP, A LEATHER BELT
5 CLIP, BUT IF YOU HAD THE THING LOOSE IN YOUR POCKET, THAT THAT
6 IS MUCH MORE DANGEROUS? I DON'T UNDERSTAND THE SCIENCE BEHIND
7 THAT SUGGESTION.

8 **MR. CHHABRIA:** ALL I CAN SAY, YOUR HONOR -- AND I'M
9 NOT -- YOU KNOW, I'M NOT AN EXPERT ON THE SCIENCE EITHER, BUT
10 ALL PARTIES AGREE -- AND THIS IS WHAT THE DISCLOSURE MATERIALS
11 SAY, IS THE FURTHER AWAY FROM YOUR BODY THAT YOU KEEP YOUR
12 PHONE, THE MORE YOU WILL REDUCE EXPOSURE. AND YES, 5/8THS OF
13 AN INCH -- AND IT'S USUALLY 5/8THS OF AN INCH THAT THE USER
14 MANUALS --

15 **THE COURT:** 5/8THS OF AN INCH, THERE'S NO WAY YOU
16 WILL BE 5/8THS OF AN INCH IF YOU USE A BELT CLIP. THAT'S NOT
17 GOING TO BE 5/8THS OF AN INCH AWAY FROM YOUR BODY. WHERE DOES
18 THAT NUMBER COME FROM?

19 **MR. CHHABRIA:** IF THAT'S THE CASE ABOUT YOUR BELT
20 CLIP, YOUR HONOR, THEN YOU ARE USING YOUR PHONE IN A WAY WHERE
21 THE PHONE IS NOT COMPLIANT WITH THE FCC'S REGULATIONS, BECAUSE
22 THE USER MANUALS MAKE CLEAR THAT IF YOU DO NOT KEEP YOUR PHONE
23 AT LEAST A SMALL DISTANCE AWAY FROM YOUR BODY, YOUR PHONE MAY
24 EXCEED FCC IMPOSED LIMITS. AND, AS I MENTIONED, THE MOTOROLA
25 USER MANUAL SAYS THIS COULD CAUSE SERIOUS HEALTH EFFECTS IN THE

1 LONG TERM.

2 SO GOING BACK TO THE DISCLOSURE MATERIALS, THERE'S --
3 YOU KNOW, OUR STATEMENT IN THE DISCLOSURE MATERIALS ABOUT
4 KEEPING THE PHONE AWAY FROM YOUR BODY IS NOT INACCURATE AND
5 IT'S NOT MISLEADING.

6 GOING BACK TO WHAT MR. MCBRIDE SAID, I MEAN, HE CAME
7 OUT OF THE BOX SAYING THAT THE CITY IS REQUIRING THE RETAILERS
8 TO PROVIDE DISCLOSURE MATERIALS WHICH TALK ABOUT HOW THE FCC
9 HAS DONE ITS JOB AND WHETHER CELLPHONES ARE SAFE. THERE'S
10 NOTHING IN THE DISCLOSURE MATERIALS WHICH TALKS ABOUT HOW THE
11 FCC HAS DONE ITS JOB, AND THERE'S NOTHING IN THE DISCLOSURE
12 MATERIALS WHICH TAKES A POSITION ON WHETHER CELLPHONES ARE
13 SAFE.

14 THE ONLY THING THE DISCLOSURE MATERIALS DOES -- DO IS
15 THE SAME THING THAT THE WORLD HEALTH ORGANIZATION DOES, WHICH
16 IS SAY THAT CELLPHONES -- RADIO FREQUENCY EMISSIONS FROM
17 CELLPHONES ARE A POSSIBLE CARCINOGEN, THERE IS A POTENTIAL
18 HEALTH ISSUE HERE, AND IF YOU'RE CONCERNED ABOUT IT, HERE ARE
19 SOME MEASURES YOU CAN TAKE TO REDUCE THE -- YOUR EXPOSURE TO
20 RADIO FREQUENCY EMISSIONS FROM CELLPHONES.

21 **THE COURT:** WHAT DO YOU SAY TO THE CRITICISM OF THE
22 FACT SHEET WHERE IT SAYS, LIMITING CELLPHONE USE BY CHILDREN
23 DEVELOPING BRAINS AND THINNER SKULLS LEAD TO HIGHER ABSORPTION
24 IN CHILDREN? WHAT IS THE SCIENTIFIC BASIS FOR THAT?

25 **MR. CHHABRIA:** ON THE ONE SIDE, WE HAVE

1 MR. PETERSEN'S DECLARATION, AND I'LL GET TO THAT IN A MOMENT,
2 SUBMITTED BY CTIA.

3 ON THE OTHER SIDE, YOU HAVE -- THE ONE STATEMENT
4 THAT WE QUOTED FOR YOU IN OUR BRIEF WAS THE STATEMENT FROM THE
5 WORLD HEALTH ORGANIZATION, WHICH SAYS, "WHEN USED BY
6 CHILDREN -- " I'M QUOTING EXACTLY NOW.

7 "WHEN USED BY CHILDREN, THE AVERAGE
8 RF ENERGY DEPOSITION IS TWO TIMES HIGHER IN
9 THE BRAIN AND UP TO TEN TIMES HIGHER IN THE
10 BONE MARROW OF THE SKULL COMPARED WITH MOBILE
11 PHONE USE BY ADULTS."

12 THERE ARE ALSO -- JUST IF I COULD BRIEFLY STATE FOR
13 THE RECORD, A NUMBER OF OTHER STUDIES THAT WERE BEFORE THE
14 BOARD OF SUPERVISORS MAKE ESSENTIALLY THE SAME POINT, AND I
15 WON'T RATTLE OFF THE NAMES OF THE STUDIES BECAUSE IT WILL TAKE
16 TOO LONG, BUT JUST VERY BRIEFLY. OUR SUPPLEMENTAL REQUEST FOR
17 JUDICIAL NOTICE, EXHIBIT S; SAME REQUEST FOR JUDICIAL NOTICE,
18 EXHIBIT FF; SAME ONE, EXHIBIT O; SAME ONE, EXHIBIT JJ; SAME
19 ONE, EXHIBIT F; SAME ONE, EXHIBIT D; AND SAME ONE, EXHIBIT Z.
20 ALL OF THOSE STUDIES MAKE THE SAME POINT THAT THE WORLD HEALTH
21 ORGANIZATION MAKES. SO WE HAVE --

22 **THE COURT:** WHICH IS AGAIN?

23 **MR. CHHABRIA:** SORRY.

24 **THE COURT:** WHAT DOES THE WORLD HEALTH ORGANIZATION
25 SAY?

1 **MR. CHHABRIA:**

2 "WHEN USED BY CHILDREN, THE AVERAGE
3 RF ENERGY DEPOSITION IS TWO TIMES HIGHER IN
4 THE BRAIN AND UP TO TEN TIMES HIGHER IN THE
5 BONE MARROW OF THE SKULL COMPARED WITH THE
6 MOBILE PHONE USE BY ADULTS."

7 A BRIEF NOTE ABOUT MR. PETERSEN'S DECLARATION, WHICH
8 IS WHAT CTIA PUTS UP AGAINST THIS, IN THEIR ORIGINAL DEPOSITION
9 FILED WITH THEIR MOVING PAPERS, HE STATED THAT THIS STATEMENT
10 THAT WE WERE MAKING IN OUR DISCLOSURE MATERIALS WAS INACCURATE.
11 IN HIS REPLY DECLARATION, UPON BEING CONFRONTED WITH THE
12 STATEMENT FROM THE WORLD HEALTH ORGANIZATION, HE SAID, WELL, AS
13 A MINIMUM, THIS IS CONTROVERSIAL AS A SCIENTIFIC MATTER
14 BECAUSE -- AND I -- I DO FIND THAT THE PETERSEN REPLY
15 DECLARATION, CANDIDLY, DIFFICULT TO UNDERSTAND.

16 SO IF I MISCHARACTERIZE IT, I URGE MR. MCBRIDE TO
17 CORRECT ME. CANDIDLY, I'M NOT ATTEMPTING TO MISCHARACTERIZE
18 IT; I JUST FIND IT HARD TO FOLLOW.

19 BUT I BELIEVE THAT WHAT MR. PETERSEN'S REPLY
20 DECLARATION IS SAYING IS, LOOK, PEOPLE MIGHT GET THE WRONG IDEA
21 ABOUT THIS FROM THIS STATEMENT BECAUSE THE SAR MEASUREMENT OF
22 RADIATION INTO CHILDREN'S AND ADULTS BRAINS WILL BE THE SAME.
23 BUT I THINK -- IF I UNDERSTAND IT CORRECTLY, I THINK THAT'S
24 DIFFERENT FROM WHAT THE WORLD HEALTH ORGANIZATION IS SAYING AND
25 WHAT WE'RE SAYING IN OUR DISCLOSURE MATERIALS, WHICH IS THAT

1 THE DEPOSITION INTO THE BRAIN IS DEEPER, WHICH IS DIFFERENT, I
2 THINK, FROM SAYING THAT THERE'S A CONCENTRATION -- THERE'S A
3 HEAVIER CONCENTRATION IN A PARTICULAR SQUARE INCH OF TISSUE.

4 SO, YOU KNOW, I THINK THE PETERSEN DECLARATION AT
5 BEST IS SLIPPERY. I THINK THAT, YOU KNOW, THE CHANGING
6 POSITION FROM THE ORIGINAL PETERSEN DECLARATION, TO THE
7 PETERSEN DECLARATION FILED WITH THEIR MOVING PAPERS, TO THE
8 PETERSEN REPLY DECLARATION, THE FACT THAT IT'S SORT OF MOVING
9 THE GOAL LINE ON US WHEN YOU COMPARE IT TO ALL OF THE MATERIALS
10 WE HAVE TO SUPPORT OUR POSITION, IT'S NOT ENOUGH. IT'S
11 CERTAINLY NOT ENOUGH TO JUSTIFY FOR THAT ONE -- IF YOU ARE JUST
12 FOCUSING ON THAT ONE SENTENCE, AN INJUNCTION AGAINST THE CITY'S
13 ORDINANCE.

14 **THE COURT:** WHAT DO YOU SAY TO THE POINT THAT THE FCC
15 SET THE LEVEL AT 50 -- IN OTHER WORDS, A 50-FOLD SAFETY FACTOR,
16 SO THAT, YES, IT'S TRUE THAT CELLPHONES EMIT RADIO FREQUENCY
17 ENERGY, OF COURSE, JUST LIKE LIGHT BULBS EMIT LIGHT ENERGY, BUT
18 THAT THE LEVELS ARE SET AT SUCH A LOW LEVEL THAT IT'S DEEMED TO
19 BE SAFE FOR EVERYBODY?

20 WHAT DO YOU SAY TO THAT SCIENCE THAT THE FCC, WHO'S
21 BEEN IN THE BUSINESS OF RADIO SINCE 1934, THEY OUGHT TO KNOW
22 WHAT THEY'RE TALKING ABOUT?

23 **MR. CHHABRIA:** WELL, I'D POINT YOU PRIMARILY TO
24 EXHIBIT G TO OUR REQUEST FOR JUDICIAL NOTICE, WHICH IS ANOTHER
25 DOCUMENT FROM THE WORLD HEALTH ORGANIZATION, WHICH ANSWERS YOUR

1 QUESTION, AND I'LL DO SO BRIEFLY HERE.

2 **THE COURT:** BUT THEY HAVEN'T BEEN IN THE BUSINESS
3 SINCE 1934. THEY ARE JUST THE WORLD HEALTH ORGANIZATION, FOR
4 GOODNESS SALES. WHERE DO THEY GET OFF CONTRADICTING THE FCC?

5 **MR. CHHABRIA:** YOUR HONOR, I MEAN, THE WORLD HEALTH
6 ORGANIZATION'S CONCLUSION THAT CELLPHONE RADIO FREQUENCY ENERGY
7 IS A POSSIBLE CARCINOGEN IS --

8 **THE COURT:** POSSIBLE?

9 **MR. CHHABRIA:** POSSIBLE.

10 **THE COURT:** ANYTHING IS POSSIBLE. STAND OUT IN THE
11 SUNSHINE LONG ENOUGH, IT'S A POSSIBLE CARCINOGEN.

12 **MR. CHHABRIA:** THAT'S RIGHT. AND IT'S POSSIBLE THAT
13 A PREGNANT WOMAN DRINKING ALCOHOL COULD EXPERIENCE PROBLEMS.

14 **THE COURT:** THAT'S BEEN PROVEN. THAT'S BEEN PROVEN.

15 **MR. CHHABRIA:** ACTUALLY, I DISAGREE.

16 **THE COURT:** CAN YOU CITE A SINGLE EXAMPLE WHERE
17 ANYBODY USING CELLPHONES HAS EVER GOTTEN CANCER?

18 **MR. CHHABRIA:** THERE IS NO -- ALL PARTIES AGREE THAT
19 THERE IS NO SCIENTIFIC PROOF EITHER WAY ON WHETHER SOMEBODY HAS
20 GOTTEN CANCER FROM CELLPHONES, NO SCIENTIFIC PROOF EITHER WAY.
21 BUT TO ANSWER --

22 **THE COURT:** SO YOU'RE ASKING THEM TO PROVE A
23 NEGATIVE, THAT NO ONE HAS EVER GOTTEN IT. BUT IT'S A LOT
24 EASIER TO PROVE A POSITIVE. NO ONE -- YOU CAN'T PROVE THAT A
25 SINGLE PERSON IN THE HISTORY OF THE UNIVERSE HAS EVER GOTTEN

1 CANCER FROM USING A CELLPHONE.

2 **MR. CHHABRIA:** THAT'S NOT -- THE STATEMENT THAT IT'S
3 A LOT EASIER TO PROVE A POSITIVE THAN A NEGATIVE IS
4 RESPECTFULLY, YOUR HONOR, NOT CORRECT, AND THE WORLD HEALTH
5 ORGANIZATION EXPLAINS WHY. BECAUSE THE -- AND THIS GETS TO
6 YOUR --

7 **THE COURT:** IN THE 1950'S WHEN I WAS GROWING UP, THE
8 HEALTH PEOPLE WANTED TO PUT FLUORIDATION IN THE WATER SUPPLY IN
9 ORDER TO PROTECT CHILDREN, IN ORDER TO PREVENT CAVITIES.
10 HISTORY HAS SHOWN THAT WAS A GOOD IDEA. BUT WHEN I WAS GROWING
11 UP THERE WAS NO END OF MUNICIPALITIES WHO THOUGHT IT WAS A
12 COMMUNIST CONSPIRACY AND THAT FLUORIDATION WOULD SAP YOUR
13 PRECIOUS BODILY FLUIDS. SO IT WAS NOT PERMITTED IN ONE
14 MUNICIPALITY AFTER ANOTHER ON THE VERY THEORY THAT IT HASN'T
15 BEEN PROVEN THAT IT WON'T DO SOME HARM.

16 YOU THINK ABOUT THAT. THAT'S REALLY WHAT YOU'RE
17 SAYING, IS SINCE THEY CAN'T PROVE IT WILL NEVER CAUSE CANCER,
18 LET'S NOT DO IT. LET'S RESTRICT THE USE OF CELLPHONES, OR,
19 MAKE THEM PUT OUT INFORMATION THAT SCARES PEOPLE THAT THEY'RE
20 GOING TO GET CANCER WHEN, IN FACT, NO ONE HAS EVER GOTTEN
21 CANCER. IT CAN'T BE PROVEN.

22 **MR. CHHABRIA:** YOUR HONOR. THINK ABOUT THE
23 IMPLICATIONS OF WHAT YOU'RE SAYING. IT SEEMS TO ME WHAT YOU'RE
24 SAYING IS WE HAVE TO WAIT UNTIL SCIENTIFIC PROOF THAT A PRODUCT
25 KILLS PEOPLE BEFORE WE CAN WARN SOMEBODY ABOUT THE POTENTIAL

1 RISKS. THAT'S NOT THE RULE. THAT'S NEVER BEEN THE RULE. AND
2 THAT WOULD BE HIGHLY IMPRACTICABLE. THINK ABOUT IT.

3 WE -- YOU KNOW, THE WORLD HEALTH ORGANIZATION HAS
4 IDENTIFIED A POSSIBLE RISK. THE STUDIES, THE RECENT STUDIES
5 THAT THE WORLD HEALTH ORGANIZATION RELIES UPON HAVE IDENTIFIED
6 THAT THERE IS A POSSIBLE RISK. THOSE STUDIES, INCIDENTALLY, TO
7 GO BACK TO --

8 **THE COURT:** POSSIBLE.

9 **MR. CHHABRIA:** -- TO GO BACK TO YOUR 1/50TH
10 QUESTION --

11 **THE COURT:** BUT THE FCC HAS CONCLUDED AFTER
12 VOLUMINOUS STUDY -- AND THEY'RE EXPERTS, NOT THE WORLD HEALTH
13 ORGANIZATION. THE FCC HAS CONCLUDED THAT IT'S SAFE OR AT
14 LEAST -- I WON'T GO SO FAR AS TO SAY SAFE, BUT THAT THEY HAVE
15 SET THE LEVEL AT SUCH A SAFETY FACTOR OF 50 THAT IT'S A GOOD
16 COMPROMISE. IT'S HEAVILY WEIGHTED IN FAVOR OF SAFETY.

17 **MR. CHHABRIA:** THE SAFETY --

18 **THE COURT:** SHOULDN'T WE GIVE A LOT OF DEFERENCE TO
19 THE PEOPLE WHO KNOW WHAT THEY'RE TALKING ABOUT, AS OPPOSED TO
20 THE WORLD HEALTH ORGANIZATION? THE BEST THEY CAN DO IS SAY
21 POSSIBLE. POSSIBLE? ANYTHING IS POSSIBLE. IT'S POSSIBLE UFOS
22 ARE GOING TO COME DOWN.

23 **MR. CHHABRIA:** IT SEEMS A LOT LESS LIKELY --

24 **THE COURT:** I HAVE BROCHURES ABOUT UFOS AND IF YOU'RE
25 CONCERNED ABOUT UFOS, HERE ARE THE STEPS YOU CAN TAKE.

1 **MR. CHHABRIA:** I THINK THE DIFFERENCE BETWEEN THOSE
2 TWO EXAMPLES IS THAT IF THE CITY REQUIRED PEOPLE TO TALK ABOUT
3 UFOS, THERE WOULD BE NO BASIS FOR THE CITY TO CONCLUDE THERE'S
4 A POSSIBILITY --

5 **THE COURT:** THERE'S PLENTY OF AIR FORCE DOCUMENTS IN
6 THE BLUE BOOK FROM THE 1950'S ALL ABOUT UFOS AND THE
7 POSSIBILITY OF FLYING SAUCERS.

8 **MR. CHHABRIA:** YOUR HONOR, WITH RESPECT, I THINK THAT
9 BELITTLES THE CONCLUSIONS OF THE PEOPLE WHO HAVE LOOKED AT THIS
10 ISSUE FOR A VERY LONG TIME.

11 **THE COURT:** HOW LONG DID THEY LOOK AT IT? THE AGENCY
12 IN QUESTION GAVE THE PUBLIC TWO WEEKS, NOTICE OF THE
13 REGULATION, AND TWO WEEKS LATER, TWO WEEKS, THE CITY AND COUNTY
14 OF SAN FRANCISCO DEPARTMENT OF THE ENVIRONMENT ISSUED ITS
15 REGULATION.

16 **MR. CHHABRIA:** YOUR HONOR, THIS ISSUE HAS BEEN
17 STUDIED FOR DECADES, AND THE WORLD HEALTH ORGANIZATION HAS BEEN
18 LOOKING AT THE ISSUE FOR DECADES.

19 I WOULD ADD YOU MAKE REFERENCE TO THE FCC STATEMENTS,
20 BUT THE FCC HAS MADE CLEAR AND THE UNITED STATES GOVERNMENT HAS
21 MADE CLEAR THAT THEY'VE ENGAGED IN A BALANCING AND THAT, IN
22 FACT, THE COMPETING -- THEY HAVE TO MAKE A TRADEOFF BETWEEN --
23 BETWEEN EFFICIENCY AND REDUCING RISK TO HUMAN -- OF HUMAN
24 EXPOSURE CAUSED BY CELLPHONES.

25 ONE DOCUMENT THAT I DIDN'T POINT OUT TO YOU IN MY

1 SUPPLEMENTAL BRIEF IN THAT REGARD IS ONE THAT THE OTHER SIDE
2 DID CITE ON PAGES 18 AND 19 OF ITS OPENING BRIEF, AND IT'S A
3 BRIEF BY THE UNITED STATES IN THE CELLULAR TASKFORCE CASE.

4 **THE COURT:** THAT WAS A BRIEF BY A LAWYER. I LOOKED
5 VERY HARD. THE GOVERNMENT IN THAT CASE -- I READ THE BRIEF. I
6 WENT AND GOT IT. I READ THE BRIEF. YOU ARE RIGHT, THAT'S WHAT
7 THE LAWYERS SAID. THAT'S THE LAWYER'S SPIN ON WHAT THE FCC
8 ACTUALLY SAID, WHICH WAS THEY WEIGHTED IT, THEY HAD A BIG
9 SAFETY FACTOR IN THERE, AND THAT PART IS TRUE, BUT THEY NEVER
10 WENT SO FAR AS TO SAY THE FCC ITSELF HAS NEVER, NEVER FOUND
11 IT'S ABSOLUTELY SAFE.

12 **MR. CHHABRIA:** BUT THE FCC MADE CLEAR THEY WERE
13 ENGAGING IN --

14 **THE COURT:** YOU ARE RIGHT ABOUT THAT. I GUESS I'M
15 AGREEING WITH YOU THEY DID A BALANCING. THEY WEIGHED RISK
16 AGAINST CONVENIENCE AND THE NEED FOR CELLPHONE INFRASTRUCTURE
17 AND ALL OF THAT, AND YOU ARE RIGHT ABOUT THAT. I THINK THE
18 INDUSTRY IS WRONG, THE FCC NEVER FOUND IT WAS ABSOLUTELY SAFE.
19 SO, I THINK YOU'RE --

20 **MR. CHHABRIA:** AND --

21 **THE COURT:** I AGREE WITH YOU ON THAT POINT.

22 **MR. CHHABRIA:** AND THE FCC HAS ACKNOWLEDGED THAT
23 FURTHER STUDIES ARE CONTINUING, THAT THE SCIENCE IS DEVELOPING,
24 AND THAT WE MAY NEED TO CHANGE THESE REGULATIONS.

25 NOW WE'RE IN A POSITION WHERE NOBODY IS WILLING TO

1 SAY, EXCEPT FOR CTIA, THAT THERE IS NO POSSIBLE RISK ASSOCIATED
2 WITH CELLPHONE USE. THE WORLD HEALTH ORGANIZATION SAYS THERE'S
3 A POSSIBLE RISK. THE FCC CITES TO THE WORLD HEALTH
4 ORGANIZATION'S FACT SHEET WHICH EXPLAINS WHY THERE IS A
5 POSSIBLE CARCINOGEN -- WHY CELLPHONE RADIATION IS A POSSIBLE
6 CARCINOGEN AND WHY PEOPLE SHOULD TAKE STEPS TO REDUCE THEIR
7 EXPOSURE.

8 SO, THE -- I DON'T -- I JUST DON'T THINK THIS IS THE
9 SAME THING AS UFOS. AND THE CITY CANNOT POSSIBLY BE REQUIRED
10 TO WAIT UNTIL THERE IS SCIENTIFIC PROOF THAT PEOPLE WILL BE
11 KILLED FROM A CELLPHONE AND SCIENTIFIC PROOF THAT THE REASON
12 THEY DIED WAS BECAUSE OF A CELLPHONE.

13 **THE COURT:** THINK ABOUT IT FOR A SECOND. YOU KNOW,
14 EVEN THE INFRASTRUCTURE, THE AC INFRASTRUCTURE, EMITS EMF AND
15 RADIO FREQUENCY AT LOW FREQUENCIES. WE'VE HAD THAT A HUNDRED
16 YEARS. WE'VE HAD THE SUTRO TOWER SINCE THE '70'S, BY MY
17 MEMORY, AND IT'S BEEN BEAMING, BEAMING, EVEN AS WE SPEAK,
18 HEAVY-DUTY RADIO FREQUENCY AT US FOR DECADES. WE ARE BATHED IN
19 RADIO FREQUENCY. SO IF SOMEBODY WAS GOING TO GET CANCER FROM
20 RADIO FREQUENCY, YOU THINK IT WOULD HAVE HAPPENED BY NOW.

21 **MR. CHHABRIA:** NO, AND THAT'S THE POINT OF THE
22 STUDIES THAT HAVE BEEN GOING ON OVER THE PAST SEVERAL DECADES.

23 **THE COURT:** REALLY, IT'S A VERY LONG-ACTING CANCER.
24 WHEN IS IT GOING TO APPEAR?

25 **MR. CHHABRIA:** LET ME GIVE YOU ONE EXAMPLE THAT THE

1 WORLD HEALTH ORGANIZATION CITES, AND THAT'S WHEN THE BOMB WAS
2 DROPPED IN HIROSHIMA. THAT HAPPENED, IF I REMEMBER CORRECTLY,
3 IN 1950, AND IT WASN'T FOR TWO DECADES --

4 **THE COURT:** IT HAPPENED IN 1945, IN AUGUST OF 1945.
5 PLEASE. COME ON. 1950 WAS FIVE YEARS AFTER THE WAR.

6 **MR. CHHABRIA:** WELL, THEN -- AND FORGIVE ME, I WASN'T
7 BORN AT THAT TIME. BUT THE POINT -- IT MAKES MY POINT EVEN
8 STRONGER, WHICH IS THAT, YOU KNOW, THE WORLD HEALTH
9 ORGANIZATION CITES THAT EXAMPLE AS A REASON WHY WE NEED TO BE
10 CONCERNED ABOUT THIS. BECAUSE IT TAKES A LONG -- NUMBER ONE,
11 IT TAKES A LONG TIME FOR BRAIN TUMORS TO MANIFEST, AND, NUMBER
12 TWO, THE CAUSE -- THE CONCERN ABOUT THESE STUDIES IS THAT BRAIN
13 TUMORS ARE CAUSED BY LONG-TERM USE OF CELLPHONES, AND WE LIVE
14 IN AN ERA NOW WHERE PEOPLE USE THEIR PHONES STARTING AT MUCH
15 YOUNGER AGE, THEY USE THEIR PHONES MUCH MORE FREQUENTLY, AND
16 THEY USE THEIR PHONES MUCH LONGER TERM, AND THEY'RE HOLDING
17 THEM UP AGAINST THEIR HEAD.

18 **THE COURT:** ALL RIGHT. I'VE GOT A LOT MORE HEARINGS
19 TODAY. I WANT TO GIVE THEM A CHANCE TO RESPOND ON THE OTHER
20 ISSUE, AND I WILL GIVE YOU A CHANCE TO RESPOND TO IT, TOO.
21 LET'S GO TO PREEMPTION ISSUE.

22 **MR. CHHABRIA:** I APPRECIATE YOUR HONOR'S PATIENCE.

23 **THE COURT:** TIME IS SHORT.

24 **MR. DUFFY:** I UNDERSTAND. I'LL BE VERY BRIEF. I CAN
25 PICK UP FROM WHEN THE DISCUSSION WAS.

1 **THE COURT:** ON THE PREEMPTION, LOOK, I AGREE THE FCC
2 IS EXPERT, BUT THERE'S NOTHING IN THE LAW THAT SAYS IT PREEMPTS
3 STATEMENTS LIKE THIS, SO I DON'T SEE HOW YOU CAN ARGUE
4 PREEMPTION.

5 **MR. DUFFY:** HERE'S WHERE THE CONFLICT LIES, YOUR
6 HONOR. I THINK WE AGREE ON WHAT THE LEGAL TEST IS WITH RESPECT
7 TO PREEMPTION. THE FARINA CASE FOLLOWS A LONG LINE OF CASES
8 THAT SAYS WHEN AN AGENCY BALANCES TWO POTENTIALLY COMPETING
9 INTERESTS, A STATE LAW THAT INTERFERES WITH THAT BALANCE IS
10 PREEMPTED.

11 **THE COURT:** IT'S NOT INTERFERING WITH IT. HOW DOES
12 IT INTERFERE WITH IT?

13 **MR. DUFFY:** WELL, LET ME START WITH THE CONFLICT IN
14 THE APPROACH, AND THEN I'LL TALK ABOUT THE EFFECTS, AND I WILL
15 BE BRIEF. BUT I WANT TO START WITH THE APPROACH, BECAUSE I
16 THINK IT TOUCHES ON WHAT YOUR HONOR WAS JUST TALKING ABOUT WITH
17 MR. CHHABRIA.

18 WHEN THE FCC LOOKED AT THIS ISSUE, THEY TOOK 150
19 COMMENTS THAT TOOK TWO YEARS. IT WAS A VERY SIGNIFICANT
20 EXERCISE. WHAT THEY DID WAS THEY SAID, WE'RE GOING TO BASE OUR
21 REGULATORY APPROACH ON SCIENCE, ESTABLISHED SCIENCE. SO THERE
22 ISN'T ANYWHERE DEBATE OUT THERE ABOUT THE 1.6 SAR STANDARD; IN
23 OTHER WORDS, THE ISSUE OF THERMAL EFFECTS. THERE'S NOT A LOT
24 OF CONTROVERSY ABOUT THAT. THE INTERNATIONAL SCIENTIFIC
25 COMMUNITY CAME TOGETHER AND SAID, AT A CERTAIN POINT YOU HAVE

1 THERMAL EFFECTS THAT COULD HARM HUMANS, AND THEN YOU BACK DOWN
2 FROM THAT 50-FOLD AND YOU SET A STANDARD. THE DEBATE HASN'T
3 BEEN ABOUT THAT.

4 IF YOU LOOK AT THE CRITICISM THE FCC HAS GOTTEN IN
5 THE CELLPHONE TASKS FORCE CASE AND AT THE CIRCUIT LEVEL, IT'S
6 BEEN ABOUT THIS QUESTION OF SHOULD WE REGULATE ON THE BASIS OF
7 SCIENTIFIC UNCERTAINTY. IN OTHER WORDS, SHOULD WE TAKE
8 ADDITIONAL REGULATORY ACTION TO ADDRESS THIS IDEA THAT THERE IS
9 NOT ABSOLUTE CERTAINTY IN THE SCIENCE.

10 AND THE FCC -- WHAT THE CITY AND COUNTY OF SAN
11 FRANCISCO DOES IN THIS CASE IS TAKE THE VERY OPPOSITE APPROACH
12 THAT THE FCC TOOK. THE FCC SAID, NO, WE'RE GOING TO MONITOR
13 AND -- WE'RE GOING TO MONITOR THE SCIENCE, WE'RE GOING TO BE
14 VIGILANT, AND IF SCIENCE DEVELOPS THAT CAUSES US TO TAKE A
15 DIFFERENT OR ADDITIONAL APPROACH, WE WILL DO SO.

16 IN PARAGRAPH ONE OF THE CITY'S ORDINANCE THEY SAY,
17 IT'S THE POLICY OF THE CITY OF SAN FRANCISCO TO ADHERE TO THE
18 PRECAUTIONARY PRINCIPLE WHICH PROVIDES THAT THE GOVERNMENT
19 SHOULD NOT WAIT FOR SCIENTIFIC PROOF OF A HEALTH OR SAFETY
20 RISK.

21 THERE IS YOUR CONFLICT, YOUR HONOR.

22 **THE COURT:** BUT THEY DIDN'T GO SO FAR AS TO TRY TO
23 BAR THE SALE OF THESE CELLPHONES. WHAT THEY SAID WAS, OKAY, WE
24 WANT TO INFORM THE PUBLIC ABOUT, ASSUMING THAT THE CELLPHONES
25 ARE GOING TO BE SOLD ANYWAY -- THEY ARE NOT TRYING TO STOP

1 CELLPHONES FROM BEING SOLD; THEY'RE TRYING TO GIVE CUSTOMERS
2 SOME TIPS -- THAT'S REALLY THE WAY TO DESCRIBE IT -- TIPS ON
3 HOW TO REDUCE EXPOSURE TO CELLPHONE. AND IF IT'S TRUE THAT THE
4 INDUSTRY'S OWN MANUALS CALL OUT THE SAME PROBLEM, WHAT'S WRONG
5 WITH THAT?

6 **MR. DUFFY:** WELL, IT ALTERS THE BALANCE IN THIS
7 SENSE, JUDGE: THE FCC WAS BALANCING RF HEALTH AND SAFETY AND
8 ALSO THE ADVANCEMENT OF WIRELESS TECHNOLOGY. SO WHEN YOU TELL
9 PEOPLE TO TURN OFF PHONES, WHEN YOU DISCOURAGE PEOPLE FROM
10 ADOPTION AND USAGE OF THE TECHNOLOGY, YOU ALTER THAT BALANCE.

11 I THINK IT WOULD TAKE A FULL --

12 **THE COURT:** WAIT A MINUTE. THE FCC HAS NEVER SAID
13 EVERYONE OUGHT TO BE WIRED IN 24/7. THAT'S RIDICULOUS. WHERE
14 DID YOU GET THAT IDEA?

15 **MR. DUFFY:** IT'S NOT A FEDERAL LAW, SIR, YOU HAVE TO
16 KEEP YOUR PHONE ON. ABSOLUTELY, I AGREE.

17 **THE COURT:** PEOPLE CAN BE OFF THE GRID. THERE'S NO
18 FCC POLICY YOU HAVE TO HAVE YOUR PHONE ON -- YOU DON'T EVEN
19 HAVE TO HAVE A PHONE. THE FCC NEVER SAID THAT. COME ON.
20 THAT'S A HUGE STRETCH. THAT'S A VERY WEAK ARGUMENT. THAT THE
21 FCC -- IF YOU TURN YOUR PHONE OFF, YOU'RE THWARTING FCC POLICY
22 BY NOT BEING HOOKED INTO THE SYSTEM.

23 **MR. DUFFY:** AND I WAS TRYING TO EMPHASIZE -- THAT WAS
24 NOT THE POINT I WAS MAKING. MY POINT WAS SIMPLY THAT THE
25 ADVANCEMENT OF NEW TECHNOLOGIES IS ONE OF THE FEDERAL POLICIES

1 AT STAKE WHEN THE FCC WAS DOING THE BALANCING. SO IF YOU TIP
2 IT IN FAVOR OF SAYING DON'T USE PHONES UNTIL THEY'RE ABSOLUTELY
3 PROVEN SAFER, WHENEVER OR HOWEVER THAT MIGHT OCCUR, THAT'S THE
4 PRACTICAL CONFLICT.

5 **THE COURT:** YES, BUT -- I SEE THAT. BUT HERE'S THE
6 THING, THEY WENT BACK AND REWROTE THEIR FACT SHEET TO TRY TO
7 GET IT DOWN TO FACTOIDS THAT ARE TRUE, YOU KNOW, AS FAR AS THEY
8 GO. IN OTHER WORDS, USING A HEADSET OR A SPEAKERPHONE OR
9 TEXTING, THE PHONE IS FURTHER AWAY FROM YOUR BODY SO THAT
10 INCREASES DISTANCE. THAT'S TRUE.

11 **MR. DUFFY:** BUT THE FUNDAMENTAL NOTION, YOUR HONOR,
12 THAT CELLPHONES ARE DANGEROUS IS THE OVERARCHING MESSAGE, AND
13 THAT IS AT WAR WITH THE FCC CONCLUSION.

14 **THE COURT:** IT DOESN'T SAY THEY'RE DANGEROUS. IT
15 SAYS, IF YOU'RE CONCERNED ABOUT POTENTIAL HEALTH EFFECTS FROM
16 CELLPHONE RF ENERGY, THE CITY AND COUNTY OF SAN FRANCISCO
17 RECOMMENDS... THEN IT RECOMMENDS. THE WORD "DANGER" IS NOT ON
18 THERE.

19 **MR. DUFFY:** AS MR. MCBRIDE POINTED OUT, YOUR HONOR, I
20 THINK THE OVERARCHING MESSAGE OF THE POSTER AND THE GRAPHICS
21 AND THE ENTIRE MESSAGE SUGGESTS THAT THERE IS -- THERE'S ONE
22 THING MISSING FROM THE MESSAGE YOU'LL NOTICE, YOUR HONOR; THAT
23 IS, THIS PHONE HAS BEEN CERTIFIED SAFE BY THE FCC AND LICENSED
24 FOR SALE. YOU ARE NOT GOING TO FIND THAT IN ANY --

25 **THE COURT:** THAT IS NOT A TRUE STATEMENT. IT HAS NOT

1 BEEN CERTIFIED AS SAFE. THAT'S YOUR SPIN ON WHAT THEY DID.
2 BUT THE FCC NEVER SAID IT'S ABSOLUTELY SAFE IN ALL
3 CIRCUMSTANCES. WHAT IT SAYS WAS WE'RE DOING A 50-FOLD BALANCE.
4 THAT PART IS TRUE. SO, IN THEIR JUDGMENT, BASED ON THE SAR
5 LEVELS AND SO FORTH, THEY SET IT AT A LEVEL THAT THE RADIATION
6 IS SO LOW THAT THEY DON'T THINK IT'S GOING TO DO -- WHATEVER
7 HARM IT'S GOING TO DO IS SMALL.

8 BUT THEY NEVER SAID THERE IS NO ONE WHO'S EVER GOING
9 TO GET CANCER OR BE HARMED REGARDLESS OF THE EXTENT OF USE. SO
10 MAYBE YOU'VE GOT SOME TEENAGER WHO'S GLUED TO THE CELLPHONE WHO
11 USES IT 24/7, AND THAT'S THE EXCEPTIONAL CASE, AND SO SAN
12 FRANCISCO'S TRYING TO ADDRESS THAT PROBLEM HERE. I DON'T KNOW.
13 I DON'T THINK THE FCC WENT AS FAR AS YOU'RE CONTENDING.

14 **MR. DUFFY:** WELL, YOUR HONOR, THAT'S OUR POINT, IS
15 THAT IF WE AGREE THAT THE LEGAL TEST IS AN ALTERING OF THE
16 BALANCE, OUR ARGUMENT IS THAT THIS TIPS THE BALANCE THAT THE
17 FCC STRUCK, FUNDAMENTALLY OPPOSES THE FCC'S CONCLUSION.

18 **THE COURT:** IT'S NOT MY JOB TO -- I CAN'T START
19 TELLING PEOPLE WHAT THEY CAN AND CAN'T SAY AND WHAT THEY CAN'T
20 MAKE YOU DISCLOSE UNLESS IT VIOLATES THE FIRST AMENDMENT.
21 THEN, OF COURSE, THE JUDGE HAS GOT TO DO THAT. BUT IT'S NOT --
22 I'VE EXPRESSED SOME VIEWS HERE TODAY TO TRY TO TEST IT OUT.
23 BUT IT'S NOT MY JOB TO MEDIATE WHAT IS THE ULTIMATE SCIENCE
24 HERE. THAT'S NOT WHAT I DO.

25 BOTH SIDES CAN HAVE THEIR SAY ON THAT. AND THE

1 QUESTION IS WHETHER OR NOT THESE RULES VIOLATE THE FIRST
2 AMENDMENT OR ARE PREEMPTED, THOSE ARE MUCH MORE NARROWER LEGAL
3 ISSUES.

4 **MR. DUFFY:** THERE'S A REASON THAT OUR FIRST AMENDMENT
5 ARGUMENT COMES FIRST, I AGREE.

6 **THE COURT:** LET ME ASK YOU BOTH THIS: DO YOU WANT TO
7 RESPOND ON PREEMPTION? I'M GOING TO -- I WOULD LIKE TO ASK YOU
8 WHETHER OR NOT THE CITY AND COUNTY WILL POSTPONE THE
9 IMPLEMENTATION OF THIS FOR A WHILE SO I CAN DECIDE THIS WITHOUT
10 HAVING TO WORRY ABOUT A DEADLINE? BECAUSE I THINK THE DEADLINE
11 IS TUESDAY, RIGHT?

12 **MR. CHHABRIA:** LET ME BRIEFLY SPEAK WITH MY CLIENT
13 ABOUT THAT.

14 **THE COURT:** ALL RIGHT. I THINK I CAN GET A DECISION
15 OUT IN TWO WEEKS OR LESS, SO IT MIGHT EVEN BE NEXT WEEK, BUT I
16 HAVE TO -- SO I'M NOT ASKING FOR A LONG EXTENSION.

17 (PAUSE IN PROCEEDINGS.)

18 **MR. CHHABRIA:** I EXPLAINED TO MY CLIENT, YOUR HONOR,
19 THAT YOU ARE VERY CONSCIENTIOUS IN GETTING YOUR ORDERS OUT, SO
20 THE CITY IS WILLING TO SUSPEND ENFORCEMENT OF THE ORDINANCE
21 UNTIL YOU GET YOUR ORDER OUT.

22 **THE COURT:** THAT'S GREAT. I WILL GET IT OUT SOON, SO
23 YOU DON'T HAVE TO WORRY TOO MUCH.

24 **MR. CHHABRIA:** I DO WANT TO MAKE -- PROVIDE ONE LAST
25 RESPONSE AND IT'S -- I DON'T GET THE SENSE THAT YOUR HONOR

1 NEEDS TO HEAR ANYTHING ON THE PREEMPTION, BUT MR. MCBRIDE'S
2 POINT ABOUT THE BALANCE OF HARMS AND THE PUBLIC INTEREST, I
3 JUST WANT TO MAKE ONE VERY BRIEF POINT ABOUT THAT.

4 **THE COURT:** CAN I REPHRASE WHAT HE SAID? I DO WANT
5 YOU TO RESPOND.

6 THE CLASSIC ARGUMENT IN THIS CIRCUMSTANCE IS: WE'VE
7 LIVED WITHOUT THIS ORDINANCE FOR A HUNDRED YEARS SINCE THE
8 HISTORY OF RADIO, AND NOW THAT IT'S COME ALONG, WHY NOT
9 PRESERVE THE STATUS QUO, WHAT'S THE RUSH, LET THE DISTRICT
10 COURT AND THE NINTH CIRCUIT HAVE A CRACK AT THIS BEFORE THE
11 STORES HAVE TO DO ALL OF THESE POSTERS. SO WHAT DO YOU SAY TO
12 THAT?

13 **MR. CHHABRIA:** WELL, TWO POINTS. EVEN IF ONE
14 CONCLUDES THAT THERE ARE SERIOUS QUESTIONS ON THE FIRST
15 AMENDMENT ISSUE, THERE'S STILL A BALANCING OF THE PUBLIC
16 INTEREST, AND THERE ARE TWO ELEMENTS TO THAT.

17 THE FIRST ELEMENT IS THAT -- AND I WILL ANSWER YOUR
18 QUESTION ABOUT WHAT'S THE RUSH, I PROMISE. BUT THE FIRST
19 ELEMENT OF THE INQUIRY IS WHAT IS THE LEVEL OF FIRST AMENDMENT
20 HARM? WE KNOW IF THERE'S A FIRST AMENDMENT VIOLATION,
21 IRREPARABLE HARM IS PRESUMED, BUT WE STILL HAVE TO ASK WHAT IS
22 THE DEGREE OF THIS HARM. THAT'S WHAT THE SAMMARTANO CASE OUT
23 OF THE NINTH CIRCUIT THAT BOTH PARTIES CITE TELL US. IN THIS
24 CASE WE KNOW FROM ZAUDERER A DISCLOSURE REQUIREMENT IMPLICATES
25 THE FIRST AMENDMENT IN A MUCH LESS SERIOUS WAY THAN A

1 RESTRICTION ON SPEECH.

2 WE DON'T HAVE A SITUATION IN WHICH ANYBODY ELSE'S
3 FIRST AMENDMENT RIGHTS ARE IMPLICATED OTHER THAN THE RETAILERS
4 AND ONLY IN THIS VERY LIMITED WAY -- AND AS A MATTER OF FACT,
5 THE WHOLE POINT OF THE FIRST AMENDMENT IS TO PROMOTE THE
6 EXCHANGE OF IDEAS. SO TO THE EXTENT YOU BALANCE THE RETAILER'S
7 INTEREST AGAINST THE PUBLIC'S INTEREST, THE PUBLIC IS
8 BENEFITING FROM THE EXCHANGE OF IDEAS BY PERMITTING THIS
9 DISCLOSURE TO GO FORWARD.

10 IN TERMS OF WHAT'S THE RUSH, I GUESS, PRIMARILY, WHAT
11 I WOULD SAY TO YOUR HONOR IS THIS: IT'S TRUE THAT WE HAVEN'T
12 HAD A REGULATION LIKE THIS ANYWHERE IN THE COUNTRY BEFORE,
13 AND -- BUT IT'S NOT AT ALL CLEAR THAT PEOPLE ARE NOT BEING
14 HARMED BY THE ABSENCE OF SUCH A REGULATION.

15 AND THERE IS AN IMPORTANT -- THERE IS A DIFFERENCE
16 THAT I THINK THAT CTIA DOES NOT TAKE PROPER ACCOUNT OF BETWEEN
17 A VOLUNTARY DECISION TO DELAY ENFORCEMENT -- IN ORDER TO GET IT
18 RIGHT, IN ORDER TO RESPECT THE REASONABLE OBJECTIONS SUBMITTED
19 BY ANOTHER SIDE IN LITIGATION THAT DIDN'T PARTICIPATE IN PUBLIC
20 COMMENT, AND SO THIS WAS THE FIRST TIME FOR THE CITY TO TAKE
21 INTO ACCOUNT THE REASONABLE OBJECTIONS SUBMITTED BY CTIA.

22 THERE'S A VERY BIG DIFFERENCE BETWEEN A VOLUNTARY
23 ENFORCEMENT DELAY DECISION BY A RESPONSIBLE PUBLIC ENTITY WHO'S
24 TAKING INTO ACCOUNT REASONABLE CONCERNS AND A COURT-ORDERED
25 INJUNCTION WHICH PREVENTS FROM TAKING PLACE EFFECT LEGISLATION

1 THAT WAS DULY ENACTED BY THE REPRESENTATIVES OF THE PEOPLE.
2 AND THAT'S THE POINT THAT THE GOLDEN GATE RESTAURANT
3 ASSOCIATION CASE MAKES, WHICH WE CITE AT THE END OF OUR BRIEF,
4 VERY END OF OUR BRIEF, AND THAT'S ALL. THANK YOU.

5 **MR. MCBRIDE:** MIGHT I HAVE ONE OR TWO POINTS ON THE
6 FIRST AMENDMENT? I KNOW THE COURT IS PRESSED FOR TIME.

7 **THE COURT:** ONE POINT.

8 **MR. MCBRIDE:** AND ONE FACTUAL CORRECTION IF I COULD?
9 THE POINT IS THERE ARE MANY CASES THAT PROTECT
10 COMMERCIAL SPEECH. MR. CHHABRIA IS ALMOST IN THE POSITION OF
11 REVERSING 35 YEARS OF SUPREME COURT JURISPRUDENCE ON THE FIRST
12 AMENDMENT. HE'S BASICALLY SAYING WE HAVE NO PROTECTION FOR
13 COMMERCIAL SPEECH IN THAT STORE. WE DO, IN FACT, HAVE SUCH
14 PROTECTION.

15 HE'S NOW ADMITTING THAT HE'S CHANGING OUR SPEECH. HE
16 SAYS, LET THEM INCREASE THE SIZE OF THE CARD. HOW MUCH CAN
17 THEY DO BEFORE THEY'VE IMPINGED UPON THE FIRST AMENDMENT?

18 THE FACTUAL POINT I WANTED TO MAKE IS THE W.H.O., THE
19 W.H.O. HAS EVALUATED OVER 800 SUBSTANCES. THEY'VE ONLY FOUND
20 THAT ONE IS PROBABLY NOT CARCINOGENIC. IN OTHER WORDS, I THINK
21 YOUR HONOR HIT THE NAIL RIGHT ON THE HEAD. THESE SCIENTISTS
22 SPEAK DIFFERENTLY THAN WHEN WE DO. WHEN THEY SAY "POSSIBLY
23 CARCINOGENIC," THEY MEAN IT HASN'T BEEN PROVEN THAT IT ISN'T
24 CARCINOGENIC. THAT'S WHY COFFEE AND PICKLES ALSO ARE THERE AS
25 POSSIBLE CARCINOGENIC.

1 I WANTED TO READ TO THE COURT -- THIS IS FROM -- THIS
2 IS DOCUMENT 61 IN THE COURT'S DOCKET, WHICH IS THE DECLARATION
3 OF RONALD PETERSEN. HE QUOTES FROM THE W.H.O. REPORT. AFTER
4 THE W.H.O. MAKES THE CATEGORIZATION OF POSSIBLY CARCINOGENIC,
5 IT SAYS THIS. IT SAYS:

6 "A LARGE NUMBER OF STUDIES HAVE
7 BEEN PERFORMED OVER THE LAST TWO DECADES TO
8 ASSESS WHETHER MOBILE PHONES POSE A POTENTIAL
9 HEALTH RISK. TO DATE, NO ADVERSE HEALTH
10 EFFECTS HAVE BEEN ESTABLISHED AS BEING CAUSED
11 BY MOBILE PHONE USE."

12 SO THE W.H.O. IS NOT INCONSISTENT WITH THE FCC. WHAT
13 IT'S SAYING IS THERE'S NO EVIDENCE THAT CELLPHONES ARE
14 DANGEROUS IN ANY WAY BUT, YOU KNOW, THEIR CLASSIFICATION IS
15 SUCH THAT EVERYTHING IS A POSSIBLE CARCINOGEN UNTIL IT'S PROVEN
16 DIFFERENTLY.

17 THAT'S OUR POINT ABOUT THAT POSTER. THAT'S HIGHLY
18 MISLEADING TO TAKE WHAT THE W.H.O. SAID ABOUT CELLPHONES BEING
19 POSSIBLY CARCINOGENIC AND ISOLATE IT BY ITSELF.

20 YOUR HONOR KNOWS -- YOUR HONOR HAS MENTIONED EARLIER,
21 YOU KNOW, YOU CAN PLUCK THINGS OUT AND STICK THEM SOMEWHERE,
22 AND THEY MAY BE TECHNICALLY TRUE BUT HIGHLY MISLEADING. THAT'S
23 WHAT WE HAVE HERE, BECAUSE IN COMMON PARLANCE "POSSIBLY
24 CARCINOGENIC" FOR THE AVERAGE SAN FRANCISCAN IS NOT GOING TO
25 MEAN, YOU KNOW, NOT DEFINITELY EXCLUDED. IT'S NOT GOING TO

1 MEAN THAT NO TEST HAS EVER SHOWN THAT IT'S CAUSED CANCER.

2 I THINK THE FAILURE TO QUOTE SOMEWHERE ON THAT
3 DOCUMENT, ON ANY OF THE DOCUMENTS, THAT THE FCC HAS CERTIFIED
4 THE PHONES AS SAFE OR HAS CERTIFIED THE PHONES DO NOT CAUSE A
5 DANGER TO HUMAN BEINGS IS -- EVERY ONE OF THE MANUALS THAT
6 MR. CHHABRIA POINTED TO, THE USER MANUALS, SAY THAT. BEFORE
7 THEY SAY ANYTHING ELSE, THEY SAY, LOOK, THE FCC HAS CERTIFIED
8 THIS PHONE FOR SALE IN THE UNITED STATES AND IT MEETS THE SAR
9 STANDARDS OF THE FCC WITH THE 50-FOLD SAFETY FACTOR. WHY ISN'T
10 THAT USEFUL INFORMATION?

11 I MEAN, I THINK SAN FRANCISCO IS CLEARLY TRYING --
12 THOSE DOCUMENTS, WHETHER OR NOT THEY'RE TRYING TO SEND AN
13 ALARMIST MESSAGE -- I MEAN, WHY THE RED CIRCLES AROUND THE HEAD
14 AND GROIN? WHAT MESSAGE DOES THAT SEND TO A HUMAN BEING
15 SHOPPING FOR A PHONE?

16 I DIDN'T HEAR ANY REBUTTAL OF THE POINT THAT
17 CHILDREN'S TISSUE DOES NOT ABSORB RF ENERGY IN ANY GREATER
18 PROPORTION THAN ADULT TISSUE.

19 **THE COURT:** NO. HE CITED TO SOMETHING IN THE REQUEST
20 FOR JUDICIAL ADMISSION. I DISAGREE WITH YOU. COUNSEL DID CITE
21 TO SOMETHING.

22 **MR. MCBRIDE:** WELL, THERE'S ACTUALLY -- FIRST OF ALL,
23 JUDICIAL NOTICE OF THOUSANDS OF SCIENTIFIC STUDIES FOR THE
24 TRUTH OF WHAT'S ASSERTED THEREIN IS NOT A PROPER USE OF
25 JUDICIAL NOTICE. WHAT WE DIDN'T SEE IS A DECLARATION ACTUALLY

1 MEETING THE PETERSEN DECLARATION.

2 BUT IF I COULD, YOUR HONOR? IT TOOK ME A WHILE.
3 IT'S A DIFFICULT SCIENTIFIC POINT. YES, THE CHILD'S HEAD IS
4 SMALLER, SO THE PLUME ENTERS MORE OF THE CHILD'S HEAD AND BRAIN
5 THAN YOURS OR MINE. BUT THE POINT IS SAR VALUE REMAINS THE
6 SAME. THE ACTUAL ABSORPTION OF RF ENERGY IS THE SAME AND IT
7 REMAINS BELOW THE FCC STANDARD. THEY USE THE WORD "ABSORPTION"
8 THERE. THAT'S MISLEADING. THAT'S THE POINT.

9 **THE COURT:** WE'VE GOT TO BRING IT TO A CLOSE. I
10 DON'T KNOW THE ANSWER. WITHIN A WEEK I'LL GET YOU AN ORDER.

11 (PROCEEDINGS ADJOURNED.)
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CERTIFICATE OF REPORTER

I, JOAN MARIE COLUMBINI, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C 10-3224 WHA, CTIA V. CITY AND COUNTY OF SAN FRANCISCO, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

JOAN MARIE COLUMBINI, CSR 5435, RPR

THURSDAY, NOVEMBER 3, 2011